

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**October 31, 2005**

<b>IN RE:</b>	)	
	)	
<b>JOINT PETITION OF TENNESSEE-</b>	)	<b>DOCKET NO.</b>
<b>AMERICAN WATER COMPANY AND</b>	)	<b>03-00388</b>
<b>MARION COUNTY TENNESSEE, FOR</b>	)	
<b>APPROVAL OF PURCHASE AGREEMENT</b>	)	

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**ORDER APPROVING ORDER, REPORT AND RECOMMENDATION  
OF HEARING OFFICER, CCN, PURCHASE AND FRANCHISE AGREEMENTS**

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This matter came before Director Deborah Taylor Tate, Director Sara Kyle, and Director Ron Jones of the Tennessee Regulatory Authority (the “Authority” or “TRA”), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on April 4, 2005 for consideration of the *Order, Report and Recommendation of Hearing Officer (“Report and Recommendation”)* filed on March 8, 2005, attached hereto as Exhibit A.

**BACKGROUND**

Tennessee American Water Company (“TAWC” or the “Company”) and Marion County, Tennessee (“Marion County” or the “County”) (together “Petitioners”) filed the *Joint Petition of Tennessee American Water Company and Marion County, Tennessee for Approval of Purchase Agreement (“Joint Petition”)* with the TRA on June 12, 2003. The *Joint Petition* attaches and describes a purchase agreement (“Purchase Agreement”) entered into by the Petitioners.<sup>1</sup> The Purchase Agreement provides that TAWC has agreed to purchase the assets of a certain water

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<sup>1</sup> *Joint Petition*, p 1 (June 12, 2003)

utility distribution system ("Water System") owned by and located in Marion County.<sup>2</sup> An operating and maintenance agreement ("O&M Agreement") describing the manner in which the Company will operate the Water System pending approval of the Purchase Agreement by the TRA is attached as an exhibit to the *Joint Petition*.<sup>3</sup> The Company's obligations under the Purchase Agreement are expressly contingent upon the Authority's approval of the Purchase Agreement.<sup>4</sup>

The Purchase Agreement further grants the Company a franchise to operate the Water System within County rights-of-way.<sup>5</sup> The *Joint Petition* expressly asks the TRA to approve the Purchase Agreement and the franchise agreement contained therein.<sup>6</sup>

The Authority Staff ("Staff") submitted a data request ("*First Data Request*") on July 17, 2003 to the Petitioners seeking specific information regarding the Purchase Agreement. The Petitioners filed a joint response ("*First Response*") to the *First Data Request* on July 25, 2003. The Petitioners stated in their *First Response* that the primary reason for executing the O&M Agreement was to allow the Company to take over operation of the Water System until such time as the Purchase Agreement could be finalized.<sup>7</sup> The Petitioners also stated in their *First Response* that they executed the O&M Agreement in order to qualify for \$500,000 in Community Development Block Grant funds which would be used to pay a portion of the cost of constructing facilities necessary to connect the Water System to the Lone Oak Utility District System in Sequatchie County, Tennessee.<sup>8</sup> The Petitioners asserted that connection to the Lone Oak Utility District was necessary to address the Water System's ongoing water supply

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<sup>2</sup> *Id.*, Exhibit A

<sup>3</sup> *Joint Petition*, p. 2 (June 12, 2003) See also *Joint Petition*, Exhibit C

<sup>4</sup> *Joint Petition*, p. 2 (June 12, 2003)

<sup>5</sup> *Joint Petition*, p. 2 (June 12, 2003)

<sup>6</sup> *Joint Petition*, p. 3 (June 12, 2003) Tenn. Code Ann. § 65-4-107 (2004) requires that franchises granted to any public utility be submitted to the Authority for approval

<sup>7</sup> *First Response*, p. 2 (July 25, 2003)

<sup>8</sup> *First Response*, p. 2, (July 25, 2003) See also Transcript of Proceedings, p. 11 (January 20, 2004)

problems.<sup>9</sup>

Authority Staff submitted a second data request ("*Second Data Request*") to the Petitioners on August 11, 2003. The Petitioners filed a joint response to the *Second Data Request* ("*Second Response*") on August 20, 2003.

The Authority considered the *Joint Petition* at the regularly scheduled Authority Conference held on October 21, 2003. Thereafter, the voting panel assigned to this docket voted unanimously to appoint the Authority's General Counsel or his designee as Hearing Officer for the purpose of evaluating the O&M Agreement and rendering a decision on the issue of whether the Company has the appropriate authority to expand its service area as described in the *Joint Petition*.<sup>10</sup>

On November 26, 2003, the Petitioners filed the *Amendment to Petition to Attach Conformed Rules and Regulations and to Request a Certificate for Convenience and Necessity* ("*Petition Amendment*"). In the *Petition Amendment*, the Petitioners request that the Authority grant the Company a Certificate of Public Convenience and Necessity ("CCN") in the event that the Authority determines that a CCN is required for the Company to operate the Water System located in the Suck Creek area of Marion County.<sup>11</sup> The Petitioners also state that it is the Company's intention to apply its current General Water Service Tariff to establish the rates, rules, regulations and conditions of water service to the Water System to the extent that such do not conflict with the *Joint Petition* or Purchase Agreement.<sup>12</sup> A copy of the tariff setting forth the Company's rates, rules, regulations, and conditions of water service is attached to the *Petition Amendment*.

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<sup>9</sup> *First Response*, p 3 (July 25, 2003)

<sup>10</sup> *Order Appointing Hearing Officer*, p 1 (November 4, 2003)

<sup>11</sup> *Petition Amendment*, p 1 (November 26, 2003)

<sup>12</sup> *Petition Amendment*, p 1 (November 26, 2003)

On December 22, 2003, the Hearing Officer issued a Notice of Hearing publicly announcing that a hearing would be held on January 20, 2004 to address the O&M Agreement and the issue of whether the Company has the appropriate authority to expand its service area into the County.

On January 16, 2004, the Petitioners submitted pre-filed testimony from the following persons: Mr. James R. Hamilton, Director of Business Development for the Southeast Region of American Water;<sup>13</sup> and Mr. Dan Bailey, Business Manager for the Company. On January 20, 2004, the Petitioners submitted pre-filed testimony from Mr. Burney McDowell, former member of the Marion County Commission.

The Petitioners also filed their *Memorandum in Support of Petition* ("Memorandum") on January 16, 2004 addressing the issue of whether a CCN is necessary for the Company to operate the Water System in the County. In their *Memorandum* the Petitioners state that the Company is not necessarily required to obtain a CCN to operate the Water System in the County.<sup>14</sup> No person intervened in this docket.

Pursuant to the above-referenced Notice, a hearing was held on January 20, 2004 regarding the O&M Agreement and the Company's authority to operate the Water System in the County. Mr. Joe A. Conner, Esq. of Baker, Donelson, Bearman and Caldwell, P.C. appeared on behalf of the Company and the County. Mr. James R. Hamilton, Mr. Daniel R. Bailey, and Mr. Burney McDowell testified on behalf of the Petitioners. The witnesses answered questions posed by Mr. Hal Novak, Chief of the TRA Energy and Water Division. Evidence was presented during the hearing regarding the technical, managerial and financial fitness of the Company to provide water service in Marion County. Evidence was also presented on the issue of whether granting the Company a CCN to provide water service in the County would serve the

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<sup>13</sup> TAWC is a wholly owned subsidiary of American Water

<sup>14</sup> *Memorandum*, p. 3 (January 16, 2004)

public interest.

### **Report and Recommendation of the Hearing Officer**

The Hearing Officer found that there is no specific statute or regulation that requires Authority approval of an agreement merely to operate and maintain facilities that have otherwise been properly established pursuant to law and that as such, the O&M Agreement is not required to be submitted for TRA approval. Nevertheless, the Hearing Officer specifically stated, “This conclusion in no way detracts from the Authority’s general jurisdiction over the subject matter of such agreements including the property, property rights, facilities, and franchises of public utilities entering into such agreements.”<sup>15</sup>

Regarding the issue of whether a CCN is required, the Company argued that the area the Company desired to serve is currently served by the County and not by a competing private company or public utility district. According to TAWC, its present service area is not defined by a CCN granted by the TRA but rather by the Company’s corporate charter granted by the State of Tennessee in 1868. The Company was unable to provide a copy of the corporate charter. Quoting from the 1868 charter in its *Memorandum*, the Company stated that Section 26 of the charter authorized the Company “to supply with water the inhabitants of the City of Chattanooga, and the evirons [sic] thereof, and all who may be along the line of the company’s pipes.”<sup>16</sup> The Company interpreted Section 26 of the 1868 charter such that “its authority to serve extends beyond Chattanooga into neighboring areas, such as the Suck Creek area.”<sup>17</sup> The Suck Creek area is located within Marion County, Tennessee and is the area in which the County’s Water System is located.

The Company argued that “the CCN statutes do not appear to require a CCN unless the

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<sup>15</sup> *Report and Recommendation*, p 9 (March 8, 2005)

<sup>16</sup> *Memorandum*, p 1 (January 16, 2004)

<sup>17</sup> *Id*

area to be served is currently being served by another private or investor-owned utility,”<sup>18</sup> and pointed out that the service area the Company seeks to serve is currently served by the County, and not by any private company.<sup>19</sup> The Company stated further that “a CCN is not required if the territory to be served is currently being served by a municipality or county utility because the intent of the municipality or county would be evident in the franchise.”<sup>20</sup> The Company concluded that because the area it seeks to serve is currently served by the County, and because the County has passed a resolution granting the authority to serve in the above-referenced area, a plain reading of the “CCN statutes” reveals that “a CCN is not necessarily required.”<sup>21</sup>

The Hearing Officer examined the statutes governing the granting of a CCN and stated:

The Authority regulates the provision of water service in Tennessee by public utilities pursuant to Tenn. Code Ann. § 65-4-201(a) (hereafter the “CCN Statute”). Tenn. Code Ann. § 65-4-101(a) (2004) defines a public utility as including corporations that “own, operate, manage or control, within the state, any . . . water . . . or any other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof.” The Company clearly falls within this definition as a public utility.

Tenn. Code Ann. § 65-4-101(6)(B) (2004) provides that the term “public utility” shall not be construed to include any county, municipal corporation, or other subdivision of the state of Tennessee. Therefore the County is not a public utility and is not subject to the requirements of Tenn. Code Ann. § 65-4-201(a) (2004). No public utility is permitted to begin construction or operation of a new public utility facility or service before obtaining the approval of the TRA. The procedure for obtaining such approval is outlined in Tenn. Code Ann. § 65-4-201(a) (2004).<sup>22</sup>

Regarding the application of Tenn. Code Ann. § 65-4-201(a), the Hearing Officer reasoned as follows:

The second portion of the CCN Statute is applicable to the Company’s

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<sup>18</sup> *Id*

<sup>19</sup> *Id* at 2

<sup>20</sup> *Id* at 3-4

<sup>21</sup> *Id* at 3

<sup>22</sup> *Report and Recommendation*, p 9 (March 8, 2005)

activities in this matter for several reasons. The Company is operating the Water System pursuant to the O&M Agreement and is therefore the “operator” of a “plant, line, system or route to be operated as a public utility.” The Company has completed construction of a line connecting the Water System to the Lone Oak Utility District. The CCN Statute states that a CCN is required prior to a public utility’s commencement of the construction of any plant, line, system or route to be operated as a public utility. The Company is both an “operator” pursuant to the O&M agreement and “a public utility as defined by law” pursuant to Tenn. Code Ann. § 65-4-101 et seq. (2004).<sup>23</sup>

The Hearing Officer found TAWC’s argument that the Water System is within the “environs” of the City of Chattanooga unpersuasive and therefore that the Company could not rely on the 1868 charter in lieu of obtaining a CCN. On this issue, the Hearing Officer found the following:

Marion County, the county in which the Water System is located, is one of six counties that surround Hamilton County. The City of Chattanooga, although located in Hamilton County, does not share a border with Marion County. If Marion County were considered to be within the environs of Chattanooga, then it would stand to reason that any of the counties surrounding Hamilton County could also be considered within the environs of the City of Chattanooga, not to mention all of Hamilton County itself. The environs of Chattanooga can not reasonably include such a wide geographic area, especially when considered from the perspective of the time, more than one hundred years ago, when the Company’s charter was apparently granted.<sup>24</sup>

Commenting on the criteria for granting a CCN, the Hearing Officer found sufficient evidence in the record to demonstrate that TAWC possesses the requisite managerial, technical and financial capability to operate the Water System in a manner consistent with the public interest. The Hearing Officer relied upon the following in support of this finding:

The Company filed testimony and offered additional live testimony demonstrating that it has the necessary management and resources to properly and efficiently operate the Water System. The Company has stated that it will operate the Water System initially as a separate and distinct system in order to cover costs while at the same to avoid an adverse impact on current ratepayers. The Company has also demonstrated a reasonable

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<sup>23</sup> *Id* at 12

<sup>24</sup> *Id* at 14

plan to address the water supply problems that the Water System has experienced in the past through the connection of the Water System to the Lone Oak Utility District, thereby providing a reliable source of water for the system. The Company has described numerous repairs and improvements it has already made to the Water System under the O&M Agreement, which further demonstrates its ability to operate the system in a manner consistent with the public interest. A current resident of Marion County testified that since the Company has taken over operation of the Water System there has been a significant improvement in the operation and maintenance of the system.<sup>25</sup>

TAWC also asked in its *Joint Petition* that the Purchase Agreement and the franchise described in the *Joint Petition* be approved. The Authority reviews franchises pursuant to Tenn. Code Ann. § 65-4-107 (2004) which provides:

No privilege or franchise hereafter granted to any public utility by the state of Tennessee or by any political subdivision thereof shall be valid until approved by the Authority, such approval to be given when, after hearing, the Authority determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest, and the Authority shall have power, if it so approves, to impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience and interest may reasonably require; provided, that nothing contained in this chapter shall be construed as applying to the laying of sidings, sidetracks, or switchouts, by any public utility, and it shall not be necessary for any such public utility to obtain a certificate of convenience from the authority for such purpose.

Based on the record, the Hearing Officer found sufficient evidence that the Company's operation of the Water System will serve the public convenience. In particular, the Hearing Officer noted that "the connection of the Water System to a stable water supply source will alleviate the Water System's current dependence on three wells that have proved inadequate in the recent past."<sup>26</sup>

The Hearing Officer determined that a CCN is required for TAWC to operate the water system and that TAWC meets the requisite criteria for obtaining such a CCN. Specifically, the

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<sup>25</sup> *Id.* at 15

<sup>26</sup> *Id.* at 16



Hearing Officer made the following determinations:

1. Tennessee-American Water Company does not presently have authority under its 1868 charter to expand its service area to include the portion of Marion County, Tennessee formerly known as the Suck Creek Utility District.
2. Tennessee-American Water Company must obtain a Certificate of Convenience and Necessity pursuant to Tenn. Code § 65-4-201(a) (2004) in order to expand its service area to include the portion of Marion County, Tennessee formerly known as the Suck Creek Utility District.
3. The operating and maintenance agreement attached as an exhibit to the *Joint Petition of Tennessee-American Water Company and Marion County, Tennessee for Approval of Purchase Agreement* is not required by law to be submitted for Authority approval.
4. . . . that after notice and based on the evidence in the record, the Authority approve the request for a certificate of convenience and necessity contained in the *Amendment to Petition to Attach Conformed Rules and Regulations and to Request a Certificate for Convenience and Necessity*.
5. . . . that after notice and based on the evidence in the record, the Authority approve the Purchase Agreement and the franchise agreement contained in the *Joint Petition of Tennessee-American Water Company and Marion County, Tennessee for Approval of Purchase Agreement*.<sup>27</sup>

#### **April 4, 2005 Authority Conference**


At a regularly scheduled Authority Conference held on April 4, 2005, the panel voted unanimously to approve the *Report and Recommendation*, the purchase agreement and the franchise agreement, and to grant TAWC a CCN. The panel noted that by approving the *Report and Recommendation*, the Authority is not specifically endorsing nor accepting the methodologies used to record the purchase transaction. The panel also voted to leave the docket open to address the accounting methodologies used to record the purchase transaction and the proposed customer application fees.

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<sup>27</sup> *Id* at 16-17

**IT IS THEREFORE ORDERED THAT:**

1. The *Order, Report and Recommendation of Hearing Officer*, attached hereto as Exhibit A, is accepted and approved and is incorporated into this Order as if fully rewritten herein.
2. The *Joint Petition of Tennessee-American Water Company and Marion County, Tennessee for Approval of Purchase Agreement* is approved.
3. The Franchise Agreement between Tennessee American Water Company and Marion County, Tennessee executed on April 1, 2003 is approved.
4. *The Amendment to Petition to Attach Conformed Rules and Regulations and to Request a Certificate for Convenience and Necessity Tennessee American Water Company* is approved and Tennessee American Water Company is granted a Certificate of Public Convenience and Necessity.
5. This docket shall remain open to address the accounting methodologies used to record the purchase transaction and the proposed customer application fees.

  
Deborah Taylor Tate, Director

  
Sara Kyle, Director

  
Ron Jones, Director

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

IN RE:	March 8, 2005	
	)	
	)	
JOINT PETITION OF TENNESSEE-	)	DOCKET NO.
AMERICAN WATER COMPANY AND	)	03-00388
MARION COUNTY TENNESSEE, FOR	)	
APPROVAL OF PURCHASE	)	
AGREEMENT	)	

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**ORDER, REPORT AND RECOMMENDATION  
OF HEARING OFFICER**

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This matter is before the Hearing Officer for review of the Operations and Maintenance Agreement between Tennessee American Water Company ("TAWC" or the "Company") and Marion County, Tennessee ("County") collectively referred to as the Petitioners and to consider whether the Company has authority to provide utility service in the County <sup>1</sup>

**TRAVEL OF THE CASE**

The Petitioners filed the *Joint Petition of Tennessee-American Water Company and Marion County, Tennessee for Approval of Purchase Agreement* ("Joint Petition") on June 12, 2003. The *Joint Petition* attaches and describes a purchase agreement entered into by the Petitioners ("Purchase Agreement").<sup>2</sup> The Purchase Agreement provides that the Company has agreed to purchase the assets of a certain water utility distribution system ("Water System") owned by the County<sup>3</sup> and located in Marion County.<sup>4</sup> An operating and maintenance agreement ("O&M Agreement") describing the manner in which the Company will operate the Water

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<sup>1</sup> *Order Appointing Hearing Officer*, p 2 (November 4, 2003)

<sup>2</sup> *Joint Petition*, p 1 (June 12, 2003)

<sup>3</sup> *Id*

<sup>4</sup> *Id*, Exhibit A

System pending approval of the Purchase Agreement by the Tennessee Regulatory Authority (“TRA” or “Authority”) is attached as an exhibit to the *Joint Petition*.<sup>5</sup> The Company’s obligations under the Purchase Agreement are expressly contingent upon the Authority’s approval of the Purchase Agreement.<sup>6</sup>

The Purchase Agreement further grants the Company a franchise to operate the Water System within County rights-of-way.<sup>7</sup> The *Joint Petition* expressly asks the TRA to approve the Purchase Agreement and the franchise agreement contained therein.<sup>8</sup>

The Energy and Water Division of the TRA (“Staff”) submitted a data request (“*First Data Request*”) on July 17, 2003 to TAWC seeking specific information regarding the Purchase Agreement. The Petitioners filed a joint response (“*First Response*”) to the *First Data Request* on July 25, 2003. The Petitioners stated in their *First Response* that the primary reason for executing the O&M Agreement was to allow the Company to take over operation of the Water System until such time as the Purchase Agreement could be finalized.<sup>9</sup> The Petitioners also stated in their *First Response* that they executed the O&M Agreement in order to qualify for \$500,000 in Community Development Block Grant funds which would be used to pay a portion of the cost of constructing facilities necessary to connect the Water System to the Lone Oak Utility District System in Sequatchie County, Tennessee.<sup>10</sup> The Petitioners asserted that connection to the Lone Oak Utility District was necessary to address the Water System’s ongoing water-supply problems.<sup>11</sup>

Authority Staff submitted a second data request (“*Second Data Request*”) to the

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<sup>5</sup> *Joint Petition*, p. 2 (June 12, 2003). See also *Joint Petition Exhibit C*

<sup>6</sup> *Joint Petition*, p. 2 (June 12, 2003).

<sup>7</sup> *Joint Petition*, p. 2 (June 12, 2003)

<sup>8</sup> *Joint Petition*, p. 3 (June 12, 2003) Tenn. Code Ann. § 65-4-107 requires that franchises granted to any public utility be submitted to the Authority for approval

<sup>9</sup> *First Response*, p. 2 (July 25, 2003)

<sup>10</sup> *First Response*, p. 2, (July 25, 2003) See also Transcript of Proceedings, p. 11 (January 20, 2004)

Petitioners on August 11, 2003. The Petitioners filed a joint response to the *Second Data Request* (“*Second Response*”) on August 20, 2003.

The Authority considered the *Joint Petition* at the regularly-scheduled Authority Conference held on October 21, 2003. Thereafter the voting panel assigned to this docket voted unanimously to appoint the Authority’s General Counsel or his designee as Hearing Officer for the purpose of evaluating the O&M Agreement and rendering a decision on the issue of whether the Company has the appropriate authority to expand its service area as described in the *Joint Petition*.<sup>12</sup>

On November 26, 2003, the Petitioners filed the *Amendment to Petition to Attach Conformed Rules and Regulations and to Request a Certificate for Convenience and Necessity* (“*Petition Amendment*”) In the *Petition Amendment* the Petitioners ask the Authority to grant the Company a certificate of convenience and necessity (“CCN”) to the extent that the Authority determines that a CCN is required for the Company to operate the Water System located in the Suck Creek area of Marion County.<sup>13</sup> The Petitioners also state that it is the Company’s intention to apply its current General Water Service Tariff to establish the rates, rules, regulations and conditions of water service to the Water System to the extent that such do not conflict with the *Joint Petition* or Purchase Agreement.<sup>14</sup> A copy of the tariff setting forth the Company’s rates, rules, regulations, and conditions of water service is attached to the *Petition Amendment*.

On December 22, 2003, the Hearing Officer issued a Notice of Hearing publicly announcing that a hearing would be held on January 20, 2004 to address the O&M Agreement and the issue of whether the Company has the appropriate authority to expand its service area

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<sup>11</sup> *First Response*, p. 3 (July 25, 2003)

<sup>12</sup> *Order Appointing Hearing Officer*, p. 2 (November 4, 2003)

<sup>13</sup> *Petition Amendment*, p. 1 (November 26, 2003).

<sup>14</sup> *Petition Amendment*, p. 1 (November 26, 2003)

into the County.

On January 16, 2004, the Petitioners submitted pre-filed testimony from the following persons: James R. Hamilton, Director of Business Development for the Southeast Region of American Water;<sup>15</sup> Dan Bailey, Business Manager for the Company; and Burney McDowell, former member of the Marion County Commission.

The Petitioners also filed their *Memorandum in Support of Petition* (“*Memorandum*”) on January 16, 2004 addressing the issue of whether a CCN is necessary for the Company to operate the Water System in the County. In their *Memorandum* the Petitioners stated that the Company is not necessarily required to obtain a CCN to operate the Water System in the County.<sup>16</sup> No person intervened in this docket.

Pursuant to the above-referenced Notice, a hearing took place on January 20, 2004 regarding the O&M Agreement and the Company’s authority to operate the Water System in the County.

Mr. Joe A. Conner, Esq. appeared on behalf of the Company and the County. Mr. James R. Hamilton, Mr. Daniel R. Bailey, and Mr. Burney McDowell testified on behalf of the Petitioners. The witnesses answered questions posed by Mr. Hal Novak, Chief of the TRA Energy and Water Division. Evidence was presented during the hearing regarding the technical, managerial and financial fitness of the Company to provide water service in Marion County. Evidence was also presented on the issue of whether granting the Company a CCN to provide water service in the County would serve the public interest.

#### **ISSUES PRESENTED FOR DECISION**

1. Whether the O&M Agreement, as filed by the Petitioners, requires prior approval

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<sup>15</sup> TAWC is a wholly owned subsidiary of American Water

<sup>16</sup> *Memorandum*, p. 3 (January 16, 2004)

by the Authority.

2. Whether the Company must first obtain a CCN from the Authority prior to expanding its service area as described in the *Joint Petition*.

## **POSITIONS OF THE PARTIES**

### **The Company**

#### **The O&M Agreement**

The Company states that it “is not aware of any statute or regulation requiring approval” by the TRA of agreements like the O&M Agreement.<sup>17</sup> At the same time the Company describes the use of operations and maintenance agreements as a way “to grow its customer base” and that it has and will continue to enter into such agreements.<sup>18</sup>

The Company stated in its *First Response* and through the testimony of Company Director of Business Development James R. Hamilton that “the primary reason for executing the Operations and Maintenance Agreement was to enable Tennessee American to assume the operation of the system until such time as the purchase could be finalized.”<sup>19</sup> Mr. Hamilton testified further that the O&M Agreement also served the purpose of preventing the County from losing \$500,000 in Community Development Block Grant funds which it may not have been able to obtain if construction of the system did not begin by June 30, 2003.<sup>20</sup> Mr. Hamilton testified that “it was essential for our [the Company’s] investment because we could not strand our

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<sup>17</sup> *Second Response*, p 1 (August 20, 2003)

<sup>18</sup> *Second Response*, p 2 (August 20, 2003)

<sup>19</sup> *First Response*, p 2 (July 25, 2003) See also *Direct Testimony of James R Hamilton*, p 2 (January 16, 2004)

<sup>20</sup> *Direct Testimony of James R Hamilton*, p 2 (January 16, 2004) See also *First Response*, p 2 (July 25, 2003) See also Transcript of Proceedings, pp 10-11 (January 20, 2004)

investment in the project without an operational agreement pending [Authority] approval of the transaction.”<sup>21</sup>

Company Business Manager Dan Bailey testified that under the O&M Agreement a “significant amount of work” has been performed on the Water System including the construction of a connector facility between the Water System and the Lone Oak Utility Distribution System.<sup>22</sup> Mr. Bailey testified that the Company has also installed equipment and performed maintenance to bring the system to a level of operation on par with Company standards.<sup>23</sup>

### **CCN Requirement**

The Company states that the area the Company seeks to serve is currently served by the County and not by a competing private company or public utility district.<sup>24</sup> The Company states that its present service area is not defined by a CCN granted by the TRA, but rather by the Company’s corporate charter granted by the State of Tennessee in 1868.<sup>25</sup> The Company did not attach a copy of the corporate charter to its filing in this docket. Nevertheless the Company purports to quote from the 1868 charter stating in its *Memorandum* that “Section 26 of the charter authorizes the Company ‘to supply with water the inhabitants of the City of Chattanooga, and the environs [sic] thereof, and all who may be along the line of the company’s pipes.’”<sup>26</sup> The Company interprets Section 26 of the 1868 charter such that “its authority to serve extends beyond Chattanooga into neighboring areas, such as the Suck Creek area.”<sup>27</sup> The Suck Creek area is located within Marion County, Tennessee and is the area in which the County’s Water System

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<sup>21</sup> Transcript of Proceedings, p. 11 (January 20, 2004)

<sup>22</sup> *Direct Testimony of Dan Bailey*, p. 2 (January 16, 2004)

<sup>23</sup> *Direct Testimony of Dan Bailey*, p. 2 (January 16, 2004)

<sup>24</sup> *Petition Amendment*, p. 1, (November 26, 2003).

<sup>25</sup> *Memorandum*, p. 1 (January 16, 2004)

<sup>26</sup> *Memorandum*, p. 1 (January 16, 2004)

<sup>27</sup> *Memorandum*, p. 1 (January 16, 2004)



is located.

The Company also offers that “the CCN statutes do not appear to require a CCN unless the area to be served is currently being served by another private or investor-owned utility”<sup>28</sup> and that a plain reading of Tenn. Code Ann. § 65-4-201 reveals that a CCN is not required.<sup>29</sup> In support of this position, the Company quotes a portion of § 65-4-201 as follows.

This section shall not be construed to require any public utility to obtain a certificate . . . for an extension into territory, whether within or without a municipality, contiguous to its route, plant, line or system, and not theretofore receiving service of a like character from another public utility.<sup>30</sup>

Relying on the above-quoted language, the Company points out that the service area the Company seeks to serve is currently served by the County, and not by any private company, and that therefore the Company is not required to obtain a CCN to serve the area in question.<sup>31</sup>

The Company also points to other statutes as evidencing legislative deference to local government regarding the issue of whether a private company may provide public utility service within locally-governed territory, including Tenn. Code Ann. § 64-4-202,<sup>32</sup> § 65-4-203,<sup>33</sup> and § 65-4-207.<sup>34</sup> The Company states further that “a CCN is not required if the territory to be served is currently being served by a municipality or county utility because the intent of the municipality or county would be evident in the franchise.”<sup>35</sup> The Company offers the conclusion that because the area it seeks to serve is currently served by the County, and because the County

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<sup>28</sup> *Memorandum*, p. 1 (January 16, 2004)

<sup>29</sup> *Memorandum*, p. 1 (January 16, 2004)

<sup>30</sup> *Memorandum*, p. 2 (January 16, 2004).

<sup>31</sup> *Memorandum*, p. 2 (January 16, 2004)

<sup>32</sup> The Company offers this statute as an example of “providing a procedure for an interference complaint” *Memorandum*, p. 2 (January 16, 2004)

<sup>33</sup> The Company offers this statute as an example of the Legislature “requiring the TRA to first make a finding of inadequate service before allowing a competing private utility to serve an area already served by another private utility” *Memorandum*, p. 2 (January 16, 2004)

<sup>34</sup> The Company quotes the following portion of this statute as stating “that the CCN statutes do not apply ‘where any municipality or county by resolution or ordinance declares that a public necessity requires a competing company in that municipality or county’” *Memorandum*, p. 2 (January 16, 2004) quoting Tenn. Code Ann. § 65-4-207

<sup>35</sup> *Memorandum*, pp. 2-3 (January 16, 2004)

has passed a resolution granting the authority to serve in the above-referenced area, a plain reading of the “CCN statutes” reveals that “a CCN is not necessarily required.”<sup>36</sup>

### **The County**

#### **The O&M Agreement**

Former Marion County Commissioner and Chairman of the Suck Creek Utility District Burney McDowell testified that it was necessary for the County to enter into the O&M Agreement with the Company because Mr. McDowell could “no longer continue as chairman of the district and there was no one else who was willing to take over.”<sup>37</sup> Mr. McDowell also testified, consistent with other witnesses to this proceeding, that the O&M Agreement enabled the commencement of construction on the system by June 30, 2003 which allowed the County to retain Community Development Block Grant funds.<sup>38</sup>

#### **CCN Requirement**

Mr. McDowell testified that since the Company has been operating the Water System under the O&M Agreement the service and quality of the system have improved.<sup>39</sup> Mr. McDowell testified that without the construction of the connector line to the Lone Oak Utility District, the Water System would remain dependent entirely upon three local wells as its source of water supply that have proven inadequate in the past to meet the needs of customers of the Water System.<sup>40</sup> Mr. McDowell testified that there are no other private or investor-owned water utilities operating in the County.<sup>41</sup>

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<sup>36</sup> *Memorandum*, p 3 (January 16, 2004)

<sup>37</sup> *Direct Testimony of Burney McDowell*, p 2 (January 16, 2004)

<sup>38</sup> *Direct Testimony of Burney McDowell*, pp 2-3 (January 16, 2004) *See also* Transcript of Proceedings, p 34 (January 20, 2004)

<sup>39</sup> Transcript of Proceedings, p 34 (January 20, 2004)

<sup>40</sup> Transcript of Proceedings, pp 33-34, 38 (January 20, 2004)

<sup>41</sup> Transcript of Proceedings, p 39 (January 20, 2004)

## **DISCUSSION**

There is no law or regulation that requires Authority approval of an agreement to merely operate and maintain facilities that have otherwise been properly established pursuant to law. The O&M Agreement is such an agreement. The O&M Agreement is therefore not required to by law to be submitted for TRA approval. This conclusion in no way detracts from the Authority's general jurisdiction over the subject matter of such agreements including the property, property rights, facilities, and franchises of public utilities entering into such agreements.<sup>42</sup>

The Authority regulates the provision of water service in Tennessee by public utilities pursuant to Tenn. Code Ann. § 65-4-201(a) (hereafter the "CCN Statute"). Tenn. Code Ann. § 65-4-101(a) (2004) defines a public utility as including corporations that "own, operate, manage or control, within the state, any . . . water . . . or any other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof." The Company fits this definition and is therefore a public utility.

Tenn. Code Ann. § 65-4-101(6)(B) (2004) provides that the term "public utility" shall not be construed to include any county, municipal corporation, or other subdivision of the state of Tennessee. Therefore the County is not a public utility and is not subject to the requirements of Tenn. Code Ann. § 65-4-201(a) (2004).

No public utility is permitted to begin construction or operation of a new public utility facility or service before obtaining the approval of the TRA. The procedure for obtaining such approval is outlined in Tenn. Code Ann. § 65-4-201(a) (2004), which states:

No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate; provided, however, that this section shall not be construed to require any public utility to obtain a certificate for an extension in or about a municipality or territory where it shall theretofore have lawfully commenced operations, or for an extension into territory, whether within or without a municipality, contiguous to its route, plant, line, or system, and not theretofore receiving service of a like character from another public utility, or for substitute or additional facilities in or to territory already served by it.<sup>43</sup>

The first portion of the CCN Statute regulates an existing public utility's extension of its operation into territories in the state already served by another public utility. The first portion of the CCN Statute requires that before a public utility makes such an extension it must obtain a CCN by submitting a written application and attending a hearing. The first portion of the CCN Statute states:

No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation,<sup>44</sup>

The second portion of the CCN Statute refers to a broader range of entities than the first portion including persons or corporations “not at the time a public utility” and “the owner or operator” of any “plant, line, system or route to be operated as a public utility.” This portion also

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<sup>42</sup> Tenn Code Ann. § 65-4-104 (2004) states “The Authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter ”

<sup>43</sup> Tenn Code Ann § 65-4-201(a) (2004)

<sup>44</sup> Tenn. Code Ann. § 65-4-201(a) (2004)

refers to any “public utility as defined by law.” Unlike the first portion of the CCN statute, which is limited in its application to “a municipality or other territory already receiving a like service from another public utility,” and unlike the third portion of the CCN statute, which, as discussed below, is limited in its application to three distinct geographical areas, the second portion of the CCN Statute is not limited in its application to any particular territory. The second portion of the CCN Statute prohibits the above-referenced entities from commencing the construction of, owning, or operating, any plant, line, system or route to be operated as a public utility or the operation of which would constitute a public utility without first having obtained a CCN or a similar certificate “in like manner,” that is, after a written application and hearing, and provides as follows:

. . . and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system, or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate;<sup>45</sup>

The third portion of the CCN Statute describes specific circumstances in which existing public utilities do not have to comply with the requirements of the first two portions of the Statute. The third portion of the CCN Statute states as follows:

. . . provided, that this section shall not be construed to require any public utility to obtain a certificate for an extension in or about a municipality or territory where it shall theretofore have lawfully commenced operations, or for an extension into territory, whether within or without a municipality, contiguous to its route, plant, line, or system, and not theretofore receiving service of a like character from another public utility, or for substitute or additional facilities in or to territory already served by it.<sup>46</sup>

The third portion of the CCN Statute provides that, notwithstanding the requirements of the first two portions, an existing public utility need not obtain a CCN to extend operations into three

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<sup>45</sup> Tenn Code Ann § 65-4-201(a) (2004)

<sup>46</sup> Tenn. Code Ann § 65-4-201(a)

types of territories: one, in an area where the public utility has previously and lawfully commenced operations; two, in an area that is contiguous to the public utility's route, plant, lines, or system and that is not receiving like service from another public utility; and three, in an area already served by the public utility to which the public utility seeks to provide substitute or additional facilities.

The first portion of the CCN Statute does not apply to the Company under the facts of this case because there is no public utility providing a like service in the territory covered by the County's Water System. The second portion of the CCN Statute is applicable to the Company's activities in this matter for several reasons. The Company is operating the Water System pursuant to the O&M Agreement and is therefore the "operator" of a "plant, line, system or route to be operated as a public utility." The Company has completed construction of a line connecting the Water System to the Lone Oak Utility District. The CCN Statute states that a CCN is required prior to a public utility's commencement of the construction of any plant, line, system or route to be operated as a public utility. The Company is both an "operator" pursuant to the O&M agreement and "a public utility as defined by law" pursuant to Tenn. Code Ann. § 65-4-101 *et seq.* (2004).

The third portion of the CCN Statute excepting certain public utilities from the requirement of obtaining a CCN does not apply to the Company because the Company does not seek to extend its operations to an area where it has previously and lawfully commenced operations or to an area that is contiguous to its route, plant, lines, or system; or to an area already served by it for the provision of substitute or additional facilities. There is no evidence in the record that the Company has previously obtained a CCN to operate in the service area described in the *Petition Amendment*. Additionally, there is no evidence in the record that the

Water System is contiguous to the Company's route, plant, line, or system. There is no evidence in the record that the Company is seeking to install substitute or additional facilities to an area already served by it.

The Legislature would not have been required to include the third portion of the CCN Statute stating that this section shall not be construed to require any public utility to obtain a certificate for an extension in or about a municipality or territory where it shall theretofore have lawfully commenced operations unless the Legislature expected that, absent this provision, such a construction would be reasonable. It is therefore logical to construct this statute to require a certificate for an extension in or about territories where no such exception is provided, including territories where a public utility shall *not* theretofore have lawfully commenced operations.

This construction is further supported by the language of the second portion of the CCN statute and is demonstrated by the example of a two public utilities who simultaneously seek for the first time to offer service in an area which is neither contiguous to either of their systems and in which there are no pre-existing facilities of any kind. Under the Company's interpretation of the CCN statute, two such public utilities would not be required to seek Authority approval prior to establishing their facilities in such an area. The second portion of the CCN statute prevents this result by preventing any owner or operator, a public utility as defined by law, from commencing the construction of such a plant, line, system, or route without having first obtained a CCN.<sup>47</sup>

The Company's suggestion that the Water System is within the "environs" of the City of Chattanooga and that the Company is therefore entitled to rely on the 1868 charter in lieu of

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<sup>47</sup> Tenn. Code Ann. § 65-4-201(a) (2004)

obtaining a CCN is unpersuasive<sup>48</sup> The City of Chattanooga is located in Hamilton County. The Company's Director of Business Development has testified that he is not aware of any Company operations being conducted outside of Hamilton County solely on the grant of authority provided by the state charter.<sup>49</sup> Marion County, the county in which the Water System is located, is one of six counties that surround Hamilton County. The City of Chattanooga, although located in Hamilton County, does not share a border with Marion County. If Marion County were considered to be within the environs of Chattanooga, then it would stand to reason that any of the counties surrounding Hamilton County could also be considered within the environs of the City of Chattanooga, not to mention all of Hamilton County itself. The environs of Chattanooga can not reasonably include such a wide geographic area, especially when considered from the perspective of the time, more than one hundred years ago, when the Company's charter was apparently granted.

Based on the foregoing, the Hearing Officer finds that the second portion of the CCN Statute applies to the Company and that the Company may not rely on the grant of state authority to operate in the City of Chattanooga and its environs for authority to operate the Water System in the County.

The Company requests in its *Petition Amendment* that if the Authority finds that a CCN is required, that the Company be granted a CCN to operate the Water System located in the portion of Marion County formerly known as the Suck Creek Utility District. There is sufficient evidence in the record demonstrating that the Company possesses the requisite managerial, technical and financial capability to operate the Water System in a manner consistent with the public interest.

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<sup>48</sup> "Environs" is defined by Webster's Dictionary as "the districts around a city" *Webster's Ninth New Collegiate Dictionary* 417 (Frederick C. Mish ed., 9th ed., Merriam-Webster 1985)



The Company filed testimony and offered additional live testimony demonstrating that it has the necessary management and resources to properly and efficiently operate the Water System. The Company has stated that it will operate the Water System initially as a separate and distinct system in order to cover costs while at the same time to avoid an adverse impact on current ratepayers. The Company has also demonstrated a reasonable plan to address the water supply problems that the Water System has experienced in the past through the connection of the Water System to the Lone Oak Utility District, thereby providing a reliable source of water for the system.<sup>50</sup> The Company has described numerous repairs and improvements it has already made to the Water System under the O&M Agreement, which further demonstrates its ability to operate the system in a manner consistent with the public interest.<sup>51</sup> A current resident of Marion County testified that since the Company has taken over operation of the Water System there has been a significant improvement in the operation and maintenance of the system.<sup>52</sup>

For the foregoing reasons, the Hearing Officer finds that the Company should obtain a CCN in order to properly expand its service area to include the portion of Marion County formerly known as the Suck Creek Utility District as described in the *Joint Petition*. The Hearing Officer finds that the Company has the requisite technical, managerial, and financial capability to provide water service as described in the *Joint Petition* and the *Petition Amendment* and recommends that the Authority grant the Company's request for a CCN.

The Company has asked in its *Joint Petition* that the Purchase Agreement and the franchise described in the *Joint Petition* be approved. The Authority reviews franchises pursuant to Tenn. Code Ann. § 65-4-107 which states as follows:

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<sup>49</sup> Transcript of Proceedings, p. 13 (January 20, 2004)

<sup>50</sup> *First Response*, p. 3 (July 25, 2003)

<sup>51</sup> *Direct Testimony of Dan Bailey*, p. 2 (January 16, 2004)

<sup>52</sup> *Direct Testimony of Burney McDowell*, p. 3 (January 16, 2004)

No privilege or franchise hereafter granted to any public utility by the state of Tennessee or by any political subdivision thereof shall be valid until approved by the Authority, such approval to be given when, after hearing, the Authority determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest, and the Authority shall have power, if it so approves, to impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience and interest may reasonably require, provided, that nothing contained in this chapter shall be construed as applying to the laying of sidings, sidetracks, or switchouts, by any public utility, and it shall not be necessary for any such public utility to obtain a certificate of convenience from the authority for such purpose.<sup>53</sup>

The record contains sufficient evidence to demonstrate that the Company's operation of the Water System will serve the public convenience. For example, the connection of the Water System to a stable water supply source will alleviate the Water System's current dependence on three wells that have proved inadequate in the recent past. Based on the foregoing, the Hearing Officer recommends that, after proper notice, the Authority approve the franchise agreement and the Purchase Agreement described in the *Joint Petition*.

### **Findings and Recommendations**

1 Tennessee-American Water Company does not presently have authority under its 1868 charter to expand its service area to include the portion of Marion County, Tennessee formerly known as the Suck Creek Utility District.

2. Tennessee-American Water Company must obtain a Certificate of Convenience and Necessity pursuant to Tenn. Code § 65-4-201(a) (2004) in order to expand its service area to include the portion of Marion County, Tennessee formerly known as the Suck Creek Utility District.

3 The operating and maintenance agreement attached as an exhibit to the *Joint Petition of Tennessee-American Water Company and Marion County, Tennessee for Approval of Purchase Agreement* is not required by law to be submitted for Authority approval.

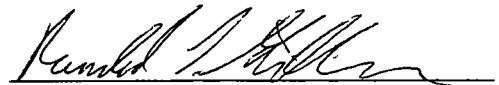
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<sup>53</sup> Tenn Code Ann. § 65-4-107 (2004)

4. It is recommended that after notice and based on the evidence in the record, the Authority approve the request for a certificate of convenience and necessity contained in the *Amendment to Petition to Attach Conformed Rules and Regulations and to Request a Certificate for Convenience and Necessity*.

5. It is recommended that after notice and based on the evidence in the record, the Authority approve the Purchase Agreement and the franchise agreement contained in the *Joint Petition of Tennessee-American Water Company and Marion County, Tennessee for Approval of Purchase Agreement*.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read 'Randal L. Gilliam', is written over a horizontal line.

Randal L. Gilliam  
as Hearing Officer